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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 17

THE UNITED STATES, PETITIONER

v.

ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) is reported at 132 F. Supp. 462.

JURISDICTION

The judgment of the Court of Claims was entered on November 8, 1955 (R. 35-36). On October 7, 1955, by order of the Chief Justice (R. 36), the time for filing a petition for a writ of certiorari was extended to and including December 9, 1955. The petition for a writ of certiorari was filed on December 6, 1955, and was

granted on January 23, 1956. 350 U.S. 953. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTION PRESENTED

During World War II, certain holidays were designated as regular work days for all federal employees. For their work on such holidays, per annum employees received no additional compensation and per diem employees were paid at their regular rate. The question presented by this case is whether per diem employees are also entitled, as a matter of statutory right, to an extra day's pay for each holiday worked.

STATUTES INVOLVED

1. The Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U.S.C. 86a, provided in 1945:[1]

> * * * whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days

[1] By Act of June 14, 1954, 68 Stat. 249, the Resolution was amended to substitute for "or any day on which the departments and establishments are closed by Executive order" the following: "or any day on which such employees are relieved or prevented from working by administrative order issued under such regulations as may be promulgated by the President."

as for other days on which an ordinary day's work is performed.

Sec. 2. The joint resolution of January 6, 1885 (U.S.C., title 5, Sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

2. The Joint Resolution of January 6, 1885, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, 24 Stat. 644, 5 U.S.C. (1934 Ed.) 86, provided:

> * * * the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

3. The Act of July 16, 1862, c. 184, 12 Stat. 587, 34 U.S.C. 505, provides:

> [T]he rate of wages of the employees in the navy yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the navy yards, subject to the approval and revision of the Secretary of the Navy.

STATEMENT

This action was instituted in the Court of Claims by five per diem employees[2] of the Department of the Navy to recover an extra day's compensation for each legal holiday on which they worked during the year 1945. The claim of each employee is based on similar facts and raises identical questions of law. Consequently, the claim of Bergh (referred to as the respondent) was selected as a controlling test case. The relevant facts, as stipulated by the parties and as found by the court below,[3] may be briefly summarized.

On May 12, 1943, by direction of the President, the following memorandum was issued to the heads of all executive departments and agencies (R. 29):

> The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war.

On December 17, 1943, this directive was reaffirmed in a memorandum stating in pertinent part (R. 30):

* * * * *

> This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

* * * * *

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[2] As used in this brief, a per diem employee is one whose compensation is fixed on a daily, hourly, or piecework basis, rather than on an annual basis.

[3] The findings of the Court of Claims (R. 18-35) follow verbatim the stipulation of facts. For that reason, only the preamble to the stipulation (R. 6) has been included in the printed record.

> There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.
>
> * * * * *
>
> With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

For their work on such holidays, per annum employees received no additional compensation and per diem employees were paid at their regular rate.

One such per diem employee was respondent Bergh, a civilian employed as a welder at the Norfolk Naval Shipyard at Portsmouth, Virginia (R. 18). His rate of pay, computed on an hourly basis, was fixed administratively by the Navy Department, pursuant to the provisions of the Act of July 16, 1862, c. 184, 12 Stat. 587, 34 U.S.C. 505 (*supra,* page 3). This rate was reflected, during the period here relevant, by a Schedule of Wages promulgated by the Secretary of the Navy. The schedule contained, *inter alia,* provisions (1) incorporating the terms of the Joint Resolution of June 29, 1938 (*supra,* pp. 2-3), which authorizes payment of regular pay to per diem employees for those days on which they are prevented from working, and (2) stipulating that for work performed on a legal holiday the employee was to be allowed one and one-half times his

schedule rate of pay unless the holiday was a part of his regular tour of duty (R. 24).

Pursuant to the aforementioned directives, Bergh worked on New Year's Day (January 1, 1945), Washington's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and Independence Day (July 4, 1945). For each of these days, all of which are legal holidays in peacetime, Bergh was paid, in accordance with the terms of the Schedule of Wages, at his regular rate (R. 18).

On March 10, 1952, Bergh submitted a claim to the Comptroller General for additional compensation equal to an extra day's pay for each day's work performed by him on the holidays listed above (R. 19). On March 28, 1952, this claim was disallowed (R. 19). Bergh then brought suit on the claim in the court below (R. 1-3). In granting the relief sought, the Court of Claims held that the 1938 Resolution did not "eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day" (R. 17). Judge Whitaker dissented (R. 18).

SUMMARY OF ARGUMENT

By this action, respondent seeks an additional day's pay for each of several holidays on which he performed work during World War II. In contrast with the wage-agreement involved in *United States* v. *Kelly*, 342 U.S. 193, the instrument setting forth the terms and conditions of respondent's employment is a Schedule of Wages promulgated by the Secretary of the Navy. The Schedule specifically provides that the regular rate of compensation is to be paid for holiday work performed by an employee within his normal tour of duty. The single issue here is, therefore, whether respondent

possessed a statutory right to double pay for holiday work—a right concededly not enjoyed by per annum employees—and whether, as a consequence, the provisions of the Schedule of Wages with respect to holiday work are invalid.

I

As this Court recognized in the *Kelly* case (342 U.S. at 194), the statute applicable to the matter of holiday pay for per diem employees during World War II is the Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U.S.C. 86a (*supra,* pp. 2-3), which provides that the employee is entitled to such pay as a matter of statutory right when he is "relieved or prevented from working solely because of the occurrence of a holiday." Since respondent was not prevented from working on the holidays here involved, but in fact did work and was paid for those days, the Resolution plainly does not confer a statutory right upon him to gratuity pay.

II

Nevertheless, the court below held that respondent was entitled to gratuity pay for the holidays on which he performed work. In this connection, the court relied on the Joint Resolution of January 6, 1885 (*supra,* p. 3), which had "allowed" per diem employees certain specified holidays with "the same pay as on other days" and which had been administratively construed to require double pay for holiday work. The 1885 Resolution, however, was superseded by the 1938 Resolution to the extent, if any, that the 1885 Resolution established a statutory right to gratuity pay for holiday work. This is shown by: (A) the language of the 1938 Resolution in its statutory context; (B) the legislative

history of the 1938 Resolution; and (C) its contemporaneous construction by the Comptroller General and the House Committee on Revision of the Laws.

A. Section 2 of the 1938 Resolution expressly provides that the 1885 Resolution "and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict." The "inconsistency or conflict" between the two statutes with respect to the matter involved here—gratuity pay for holiday work—would appear clear. The 1938 Resolution authorizes holiday gratuity pay on one condition and one condition only—namely, when per diem workers are *prevented* from working because of the holiday. Under the administrative interpretation of the 1885 Resolution, however, gratuity holiday pay was also allowed even when per diem employees were not prevented from working. The precise terms of the 1938 Resolution preclude such a construction.

Moreover, even apart from the matter of gratuity pay for holiday work, it is plain that the body of the 1885 Resolution—"allowing" certain listed holidays with "the same pay as on other days"—was necessarily superseded by the 1938 Resolution, which has its own provision for holiday pay and contains its own list of holidays. That being so, the administrative gloss relied upon by respondent could not have survived the elimination of the statutory basis for that gloss. When Congress repeals a statute, it is under no obligation to specifically enumerate the administrative rulings, based on the statute being repealed, that are thereby overruled. When the statute falls, so too do administrative rulings based on the statute.

B. The administrative interpretation given to the 1885 Resolution led to three instances of inequality between per annum and per diem employees with respect to holiday pay. Per diem employees, but not their per annum counterparts, received gratuity holiday pay in addition to their regular pay for holidays on which they worked and holiday pay for holidays falling on a non-working day. At the same time, while per diem employees were limited to the holidays specified in the governing legislation, per annum employees had the advantage of additional holidays declared by Executive Order.

The legislative history of the 1938 Resolution reveals an intent of Congress to equalize the position of per diem and per annum workers in the above respects. Per diem workers were, henceforth, entitled to pay for all holidays falling on working days; on the other hand, the Resolution abolished previously existing practices of mandatory double pay for holiday work and of holiday pay for holidays falling on non-working days.

The court below took the position, however, that the legislative purpose in enacting the 1938 Resolution was merely to award holiday pay for holidays declared by Executive Order and to abolish holiday pay for holidays falling on non-working days. Its reasoning was that Congress would not have abrogated, without specific words, the administrative practice of awarding double pay for holiday work as a matter of right. Additionally, the court below expressed the belief that Congress could not have intended either to put the Government at a comparative disadvantage in the obtaining of personnel necessary for the furtherance of the defense effort, or to allow a per diem employee who works

on a holiday to be paid no more than his fellow employee who is not required to work.

Even apart from the legislative history of the 1938 Resolution, this reasoning is unpersuasive. First, as already noted, when Congress undertakes to supersede prior legislation, it is not obliged to spell out in so many words an intent to put an end to all of the incidents and ramifications of the superseded legislation. Second, even if in 1938 the Government had been faced (as it was not) with personnel procurement problems in connection with national defense, the Resolution could not have interfered with their solution. Under the Resolution, premium pay for work performed on holidays is neither required nor prohibited; rather, the entire matter is remitted to the processes of collective bargaining and to agency discretion. Thus, where a premium for holiday work is recognized by the local prevailing wage scale, the rate of compensation for the per diem employee can be fixed accordingly, if deemed necessary or advisable. Third, since per annum workers, prior to the 1938 Resolution and for a number of years thereafter, received no additional compensation for work performed on holidays, it can fairly be said that, contrary to the view of the court below, Congress did not deem it to be inherently unjust to pay a Government employee the same amount for a holiday whether he is required to work or not.

C. The contemporaneous legislative and administrative interpretation of the 1938 Resolution fully accords with petitioner's reading of the legislative purpose. Shortly after its enactment, the Comptroller General ruled that the Resolution abolished the former practice of awarding double pay for holiday work as a matter of statutory right. The construction placed upon the

Resolution by the House Committee on Revision of the Laws, which supervises the preparation of the United States Code, is to the same effect.

III

The policy of non-observance of wartime holidays supports denial of gratuity pay to per diem employees for work on those holidays. Per annum employees worked, without gratuity compensation, on all of the holidays for which respondent seeks to recover extra pay. In granting recovery, the Court of Claims has thus placed per diem employees in a superior status denied to per annum employees by consistent legislative and administrative policy. Nothing in the terms or history of federal pay statutes justifies such discrimination. And, in any event, the wartime policy itself is a pertinent consideration in resolving the statutory question presented here.

ARGUMENT

Unlike the claim involved in *United States* v. *Kelly*, 342 U.S. 193, respondent's claim here is not based upon a collective bargaining agreement specifically providing for gratuity pay for work required to be performed on a legal holiday. Respondent's rate of compensation was fixed instead by a Schedule of Wages, promulgated by the Secretary of the Navy by virtue of the authority granted him by the Act of July 16, 1862, 12 Stat. 587, 34 U.S.C. 505 (*supra*, p. 3).[4] As respondent is com-

[4] Cf. *Determination of Wage Rates for Mechanical and Laboring Positions in the Federal Service*, (1944), 59 Monthly Labor Review 1063, 1066. As this article indicates, the Secretary of the Navy, in fixing wage rates, used wage schedules of the National War Labor Board and wage data collected by the War Department. If data was not available from these sources, the Secretary made his own surveys.

pelled to concede, nothing in that Schedule can be read as entitling him to twice his schedule rate of pay for holiday work. On the contrary, the Schedule is most explicit on the matter: for work on a legal holiday, the employee is to receive his regular rate of pay, plus an additional 50% if the holiday is not a part of his normal tour of duty; gratuity pay is authorized only with respect to holidays on which the employee is *prevented* from working (R. 24).

Thus, the question in this case is not whether respondent, because of a contract or because of the Schedule of Wages, is entitled to gratuity pay for holiday work. No contract is involved; and the Schedule of Wages is plain on its face. The question rather is whether, irrespective of the provisions of the Schedule of Wages, respondent possessed a statutory right to such pay. It is our position that the answer to this question—which this Court did not reach in *Kelly*[5]—is in the negative and that, in holding otherwise, the court below both ignored the terms of the applicable statute and disregarded its clear purpose and consistent administrative interpretation.

I

The Applicable Pay Statute—The Joint Resolution of June 29, 1938—Does Not Require the Award of Gratuity Pay to Per Diem Employees of the Navy Department for Work on Holidays During World War II.

As was noted by this Court in *United States* v. *Kelly*, 342 U.S. at 194, the statute applicable to the matter of

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[5] This Court stated in *Kelly* (342 U.S. at 195): "[The 1938 Resolution] was silent on the subject of gratuity pay for holidays on which work was performed, and we may even assume that it did not provide gratuity pay for those days."

holiday pay for Government per diem employees during the period here involved is the Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U.S.C. 86a. As of 1945, it provided in pertinent part:

> * * * whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis *are relieved or prevented from working solely because of the occurrence of a holiday* such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed. * * * [Emphasis added.]

Thus, under the Resolution, gratuity pay is provided for only in circumstances where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." If the holiday prevents an employee from working, he gets gratuity pay; if it does not prevent him from working, and he is thus able to earn his regular pay, he is not entitled to an extra day's pay as gratuity pay. As Judge Whitaker observed in his dissent in *Kelly* v. *United States,* 119 C.Cls. 197, 215, the Resolution "is clear and unambiguous and must be taken to mean just what it says."[6] Since respondent

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[6] It is a basic rule of statutory interpretation that where the literal reading of a statute leads to no ambiguity nor to any futile or absurd results nor to any outcome plainly at variance with the policy of the legislation as a whole, the plain meaning of

was not prevented or relieved from working on the holidays involved here, but rather did work and was paid for those days, the Resolution does not entitle him to gratuity pay for those holidays.

This is not to say that the 1938 Resolution forbids employing agencies from paying gratuity compensation for holiday work, either in their discretion or pursuant to collective-bargaining contracts. The payment of gratuity pay on that basis has long been common practice, as the *Kelly* case itself illustrates, and the Government has never suggested that such pay contravenes the 1938 Resolution in any way. See 342 U. S. at 195. But, as already pointed out, the question here is not what Government agencies can do as a matter of discretion or contract. In the instant case, unless the respondent has a statutory right to gratuity pay for holiday work, he cannot recover.

II

The 1938 Resolution Repealed the 1885 Resolution to the Extent, if Any, That the Latter Established a Statutory Right to Gratuity Pay for Holiday Work.

In holding that, notwithstanding the provisions of the 1938 Resolution, respondent possessed a statutory right to gratuity pay for the holidays on which he performed work, the court below pointed to the prior administrative practice under the Joint Resolution of January 6, 1885, 23 Stat. 516, as amended, 5 U.S.C. (1934 ed.) 86 (*supra*, p. 3). This Resolution pro-

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the words should normally be followed. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543. "Where the intent is plain, nothing is left to construction." *United States* v. *Fisher*, 2 Cranch 358, 386. See also *Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 492; *Osaka Shosen Line* v. *United States*, 300 U.S. 98.

vided that per diem employees of the Government were to be "allowed" certain specified holidays with "the same pay as on other days." In 1906, it was administratively held that, by implication, the 1885 Resolution entitled a per diem employee to double pay for holidays on which he was required to work. 13 Comp. Dec. 40.

While we think that the correctness of this administrative interpretation is subject to some doubt,[7] its validity for present purposes may be readily assumed; for, to the extent that the 1885 Resolution ever established a statutory right to double pay for work on holidays, it was repealed by the 1938 Resolution. This is shown by: (A) the language of the 1938 Resolution in its statutory context; (B) the legislative history of the 1938 Resolution; and (C) its contemporaneous construction by the Comptroller General and the Committee on Revision of the Laws of the House of Representatives.

A. *The language of the 1938 Resolution in its statutory context*

Section 2 of the 1938 Resolution provides that

> "The joint resolution of January 6, 1885 (U.S.C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict."

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[7] As will be seen below, the 1885 Resolution was enacted for the purpose of extending to all per diem employees of the Government the benefits conferred upon Government Printing Office employees by the Joint Resolution of April 16, 1880, 21 Stat. 304, the object of which was to insure that printers would not sustain a loss of income when the Government Printing Office was closed by reason of a holiday.

The 1938 Resolution thus expressly identifies the 1885 Resolution as "inconsistent or in conflict with the provisions of this Act" and expressly repeals the 1885 Resolution "to the extent of such inconsistency or conflict."

Riding hard on the latter phrase, respondent apparently contends that it operates as a savings clause to keep alive the pre-1938 administrative construction of the 1885 Resolution with respect to gratuity pay for work on holidays. The textual answer to this contention is two-fold.

First, it should be noted that the phrase "to the extent of such inconsistency or conflict" is directed equally (and perhaps even exclusively) to the phrase "all other laws inconsistent or in conflict with the provisions of this Act . . ." Certainly there is no basis for any argument that the phrase was particularly intended to limit the scope of the repeal of the 1885 Resolution. If anything, the contrary seems probable; from the face of the statute, one might well assume that the 1885 Resolution was wholly repealed and that the phrase "to the extent of such inconsistency or conflict" was added because of the general reference to "all other laws inconsistent or in conflict with the provisions of this Act." The legislative history of the provision (*infra*, pp. 17-24) confirms this view.

Second, in any event, the "inconsistency or conflict" between the two statutes with respect to the matter involved here—gratuity pay for holiday work—would appear clear. As already pointed out, the 1938 Resolution authorizes holiday gratuity pay on one condition and one condition only—namely, when per diem workers are prevented from working because of the holiday. Under the administrative interpretation of the 1885 Resolution, however, gratuity holiday pay was also al-

lowed even when per diem employees were not prevented from working. There surely is an "inconsistency", if not a "conflict", between two statutes, both expressly dealing with holiday gratuity pay for per diem employees, one of which requires gratuity pay where an employee actually works on a holiday and the other of which requires the gratuity only where the employee is prevented from working.

Moreover, even apart from the matter of gratuity pay for holiday work, it is plain that the body of the 1885 Resolution—"allowing" certain listed holidays with "the same pay as on other days"—was necessarily superseded by the 1938 Resolution, which has its own provision for holiday pay and contains its own list of holidays. That being so, the special administrative gloss relied upon by respondent could not have survived the elimination of the statutory basis for that gloss. When Congress repeals a statute, it is under no obligation to enumerate specifically the administrative rulings, based on the statute being repealed, that are thereby overruled. When the statute falls, so too do administrative rulings appended to and based on the statute. Such rulings do not exist "in the air," so to speak; they have no independent existence apart from the statute on which they rest.

B. *The legislative history of the 1938 Resolution*

1. *The legislative history of the 1938 Resolution indicates an intent to discontinue the differences with respect to holiday work between per diem and per annum employees.*

a. For many years, discrimination as to holiday pay existed between federal per annum employees and their per diem colleagues. Per annum employees, whose sal-

aries are traditionally regarded as payment for every calendar day of the year (whether a work day or non-work day), have always received their regular pay each period, irrespective of any holidays from which they are excused from working. On the other hand, prior to 1880, per diem and hourly employees were not paid for holidays on which no work was performed.

In the Joint Resolution of April 16, 1880, 21 Stat. 304, Congress addressed itself for the first time to the problem of the preferential treatment then accorded per annum employees with respect to holiday pay. The Resolution "allowed" per diem employees of the Government Printing Office specified legal holidays with pay and provided "that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid." The avowed Congressional intent was to eliminate, as to those per diem employees, the existing inequality and to prevent the reduction of their regular pay checks because of holidays. As the House Committee on Printing put it in its Report on the bill (H. Rept. 585, 46th Cong., 2d Sess., p. 2):

> [Government Printing Office per diem employees] should be placed upon an equality [with respect to holidays] with the employes of all other government departments, who are allowed these holidays with pay. The committee see no good reason why the general rule should make an exception of this particular class * * *."[8]

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[8] The introduction of the 1880 Resolution was prompted by a determination of the Public Printer that he was not authorized to pay printers for New Year's Day, 1880, on which day the Government Printing Office was closed.

See also, to the same effect, 10 Cong. Rec. 708, 2116, 2170-2171. Cf. First Comp. Dec., 1 Lawrence 31.[9]

Five years later, Congress enacted the Joint Resolution of January 6, 1885, by which *all* per diem employees of the Government were also "allowed" specified legal holidays with the "same pay as on other days." According to its sponsor, Representative Hopkins, the thrust of the resolution was the same as that of the 1880 Resolution (16 Cong. Rec. 411):

> I am satisfied that if the resolution be read, no member will object to it. We are now ourselves about to take a two-weeks' holiday. This resolution simply provides that the employes of the navy-yard, Government Printing Office, Bureau of Engraving and Printing, and other per diem employes of the Government shall be entitled to four or five holidays during the year without losing their pay for those days.

The purpose of the 1885 Resolution was thus to place per diem employees on a par with per annum employees with regard to holiday pay.

Nevertheless, the unduly broad language of the Resolution was interpreted so as to accord preferential treatment to per diem employees in two major respects.

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[9] That Congress did not regard the 1880 Resolution as *requiring* the payment of double compensation for holiday work by Government Printing Office employees is further suggested by the Act of January 13, 1883, 22 Stat. 402, which provided in part that "for extra work, ordered in emergencies, and performed on Sundays or legal holidays, or between [midnight and 8 A.M.], the Public Printer is hereby authorized to pay such extra prices as the customs of the trade and the justice of the case may require." The legislative history of the Act reveals that it was designed to give the Public Printer discretionary authority to provide for extra compensation. 13 Cong. Rec. 6076.

First, per diem employees were allowed gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a non-work day) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Second, if they worked on a holiday, they received a day's gratuity pay in addition to their regular rate of pay for that day. 13 Comp. Dec. 40; 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187.[10] Per annum employees holding comparable positions received neither of these benefits. A day's pay was not added to their wages where a holiday occurred on a non-work day. Nor did they receive any extra gratuity pay for a holiday on which they worked.

On the other hand, per diem employees were limited to the holidays specified in the governing legislation, while their per annum co-workers had the advantage of additional holidays declared by Executive Order.

b. The immediate occasion for the enactment of the 1938 Resolution was Executive Order No. 7763 of December 6, 1937, 2 F.R. 2685, which closed the Government offices on December 24, 1937, and excused all employees from work on that day. See H. Rept. No. 2683, 75th Cong., 3d Sess. (hereinafter referred to as "Report"). While the Order did not entail a loss of wages for per annum employees, per diem employees could not be paid for that day since the existing legislation—

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[10] 13 Comp. Gen. 295 deals with Section 46 of the Act of January 12, 1895, 28 Stat. 601, which provided for eight legal holidays with pay for Government Printing Office employees. While its language differed in some respects from that of the 1880 Resolution, the pertinent committee reports point out that Section 46 of the 1895 Act (Section 47 of the bill) was substantially identical with the 1880 Resolution. See S. Rept. No. 18, 52d Cong., 1st Sess., p. 437; S. Rept. No. 574, 53d Cong., 2d Sess., p. 24; H. Rept. No. 7, 53d Cong., 1st Sess., pp. 7-8.

the 1885 and 1895 Acts—authorized a specified number of legal holidays with pay and the 24th of December was not among them. A Joint Resolution was therefore introduced in the House of Representatives authorizing the payment of compensation to the per diem employees who had lost wages as the result of the Executive Order. H. J. Res. 551, 75th Cong., 3d Sess.

The House Committee on Civil Service, to whom the Resolution had been referred, was advised by the Civil Service Commission that the question of holiday pay for per diem workers raised broader issues which should be resolved by general legislation rather than on a piecemeal basis (Report, p. 2). A detailed decision of the Comptroller General, which compared the effect of holidays on per diem workers and per annum workers, was included in the Committee's Report (17 Comp. Gen. 519; Report, pp. 3-5).

The Comptroller General's decision disclosed that, as noted above, in one aspect the status of per diem workers was inferior to that of per annum workers. While the latter did not suffer any loss of income as the result of holidays, whether declared by statute or administrative action, per diem workers were entitled to pay only if the holiday was specified by statute; there was no authority to pay them if Government offices were closed by Executive Order. On the other hand, the Comptroller General observed, per diem employees were entitled to two benefits denied to per annum employees. While the latter were not entitled to any additional compensation if required to work on a holiday, per diem workers received not only regular pay but double pay. And, if the holiday fell on a day on which the per diem worker would not have worked anyway

(*e.g.*, a Saturday or other nonworking day), he was still considered entitled to holiday pay. Thus, the Comptroller General pointed out:

> * * * even when any of such holidays falls on a nonworkday (such as a Saturday), such employees [*i.e.*, per diem employees] receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned,

and, additionally, per diem employees receive:

> double compensation for the [holi]day if work is performed thereon. [Report, p. 5.]

The draft resolution which was substituted for the measure originally introduced, and which was enacted as the 1938 Resolution, was carefully drawn, we think, to deal with these preferences and to equalize the treatment of per diem and per annum employees. And that it was so understood by Congress is manifest from the Committee's statement, immediately following the text of the Comptroller General's decision, that "Section 2 proposes to repeal the joint resolution of January 6, 1885 (U.S.C., title 5, sec. 86) * * *."[11] There is no suggestion in the Report that any portion of the 1885 Resolution—let alone an administrative practice based on it—was to survive the repeal. If anything, as far

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[11] It might be noted in this connection that Rule XIII 2a of the House of Representatives, in effect in the 75th Congress, stipulated that whenever a committee reported out a bill or joint resolution repealing or amending any statute or part thereof, it was to include in its report (1) the text of the statute or part thereof which was proposed to be repealed and (2) a comparative print of that part of the statute proposed to be amended.

While the committee report on the 1938 Resolution contained the text of the 1885 Resolution, it did not contain the comparative print which was required if the intent had been to amend rather than repeal the 1885 enactment.

as the Report is concerned, the 1885 Resolution was repealed in its entirety.

c. Less than a year after the enactment of the 1938 Resolution, a Joint Resolution was introduced in the House of Representatives which provided, *inter alia*, that "all Acts or parts of Acts repealed or modified by the [1938 Resolution] are hereby restored to full force and effect." H. J. Res. 303, 76th Cong., 1st Sess. (R. 25). In commenting upon this proposed legislation at the request of the House Committee on Civil Service, President Mitchell of the Civil Service Commission noted that the 1938 Resolution had been interpreted by the Comptroller General to mean that per diem employees who are required to work on a holiday receive the same pay as those who are excused from work (R. 25-26). Mr. Mitchell added that the Commission believed that favorable consideration should be given to the bill, but that (R. 26):

> The Bureau of the Budget has advised this office that the enactment of H. J. Res. 303 in its present form would not be in accord with the program of the President. The Bureau states, however, that there would be no objection to the enactment of the legislation which would permit the payment of compensation to the regular per diem employee when absent from duty for any cause on a holiday occurring on a tour of duty.

House Joint Resolution 303 was not enacted (R. 25). Nor were any of the several bills introduced in the 77th and 79th Congresses which also would have had the effect of requiring either gratuity pay or compensatory time off for work performed on holidays. H. R. 1386, 77th Cong., 1st Sess.; S. 1930, 77th Cong., 1st Sess.;

H. R. 6222, 77th Cong., 1st Sess.; S. 1679, 79th Cong., 2d Sess (R. 25-28). It is to be noted that both S. 1930 and H. R. 6222, in the 77th Congress, called for the amendment of the 1938 Resolution by the addition to Section 1 of a provision that:

> [W]henever any employee of the Federal Government who is employed at any Navy yard or naval station is required to work on any such holiday or day on which the departments and establishments of the Government are closed by Executive order, he shall be allowed compensatory time off on one other workday within the week following such holiday or, in lieu thereof, be paid one additional day's pay at his regular rate.

Thus, although specifically apprised of the administrative construction placed upon it by the agency charged with its enforcement, Congress repeatedly refused to alter or amend the 1938 Resolution. In these circumstances, and in the absence of compelling evidence to the contrary, it is to be presumed that Congress was "satisfied with the [decisions of the Comptroller General] and with the interpretation of its own meaning implicit in them." *Zellerbach Co.* v. *Helvering,* 293 U. S. 172, 178-179; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *Massachusetts Mutual Life Insurance Co.* v. *United States,* 288 U. S. 269, 273; *Brooks* v. *DeWar,* 313 U. S. 354, 360.

2. *The Court of Claims' view of the purpose of the 1938 Resolution is erroneous.*

Despite the fact that, as seen above, the Committee Report on the 1938 Resolution expressly referred to *three* instances of inequality between the per diem and

the per annum employee, the court below held that the legislative purpose was solely to eliminate *two* of them. The court recognized that the Resolution was not limited to the grant to per diem employees of gratuity holiday pay for administrative holidays, for the court also recognized that the Resolution was intended to terminate one of the instances in which per diem employees were preferred over per annum employees, namely, the award of holiday pay for holidays occurring on non-working days. (R. 16.) At the same time, however, the court refused to ascribe to Congress an attempt to abolish the other preference accorded to the per diem employee, *i.e.*, the payment of double pay for work on holidays.

The court assigned three reasons for this selectivity in appraising the aims of the Resolution (R. 16-17): (a) if Congress had desired to dispense with the traditional practice of paying double pay for holiday work, it would have used express and specific words of repeal; (b) Congress could not have intended by the 1938 Resolution to "put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense"; and (c) Congress similarly could not have intended to create "the absurd situation wherein if a per diem employee were required to work on a holiday, he would be paid no more than his fellow worker who was not required to work." [12] We submit that this reasoning will not stand analysis.

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[12] As will be seen, the court below was also influenced by its erroneous belief that, under the Comptroller General's interpretation, an employee would receive less pay if he were required to work two hours on the holiday than if he were excused from working entirely. See pp. 32-33, *infra*.

a. In holding that Congress could not be presumed to have deprived per diem employees of the benefit of double pay for holidays without being specific about it, the court below stressed that this benefit was one of long standing. But the same observation could just as readily be made with respect to the grant of gratuity pay for holidays falling on non-working days, and the court below conceded that this benefit was eliminated by the 1938 Resolution. Both administrative practices developed under the 1885 Resolution and appear to be of equal antiquity;[13] both are mentioned in the Committee Report with equal emphasis; and neither is "expressly" rejected in the 1938 Resolution. In these circumstances, it could be argued with equal force under the court's theory that the Congressional intent had been limited to abolishing double pay for holiday work—the issue involved here—and had left intact holiday pay for holidays falling on non-working days.

Furthermore, as already pointed out, when Congress enacts superseding legislation, it is not obliged to undertake the virtually impossible task of explicitly touching upon all phases of the incidence and interpretation of the statute being displaced. It is surely enough that the very terms of the 1938 Resolution are at variance with the administrative interpretation given the 1885 Resolution and that, in addition, there was an express repeal of all conflicting or inconsistent statutes—with particular reference to the 1885 Resolution.

b. The argument of the court below, that it would be improper to impute to Congress an intent to place the Government at a competitive disadvantage in the acquisition of personnel needed for the purpose of na-

[13] Cf. *Kelly* v. *United States*, 119 C.Cls. at 203, fn. 3.

tional defense, is similarly without substance. Not only were the national defense efforts preceding this country's entry into World War II still not under way when the 1938 Resolution was enacted, but also Congress found it necessary during the period that the Resolution was under legislative consideration to appropriate $1,425,000,000 for the Works Progress Administration (52 Stat. 809) and $250,000,000 for Emergency Relief (52 Stat. 83) to alleviate the major national problem of unemployment. And the same Congress enacted the Fair Labor Standards Act of 1938, 52 Stat. 1060, one of the purposes of which was to reduce employment by reducing hours of work. *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572, 577.

Moreover, it must be emphasized again, the question here is whether the 1938 Resolution *requires* an award of double pay, not whether it *permits* it. As this Court noted in *Kelly* (342 U. S. at 195), we have never suggested that the Resolution constitutes an absolute bar to premium pay for holiday work. Rather, our consistent position has been that the effect of the Resolution is to remit the entire matter of wages for holidays worked to the processes of collective bargaining and the discretion of the employing agencies, free of statutory compulsion. Thus, in the context of this case, had the Secretary of the Navy at some point determined that the exigencies of personnel procurement necessitated the payment of gratuity pay for holiday work, 34 U.S.C. 505 (*supra,* p. 3) would have provided him with sufficient authority to revise the Schedule of Wages accordingly. That no revision of this kind was made either prior to or during the period here relevant indicates that, in the Secretary's view, no such necessity existed. And that the Secretary's view was well

justified is reflected in part by the comparison made by the court below, in its findings, of employment in the Norfolk Shipyard with similar non-government employment in the same area. On the basis of that comparison (R. 34-35), there can be little doubt that, on balance, the terms and conditions of respondent's employment, formulated by the Secretary of the Navy and incorporated in the Schedule of Wages, were at least as favorable as those governing the respondent's counterpart in private industry.

c. As for the belief of the court below that it would be "absurd" to pay a per diem employee who is required to work on a holiday the same pay as is received by his fellow employee who is excused from working, there is absolutely nothing in the legislative history of the 1938 Resolution, or elsewhere, to suggest that the 75th Congress shared that belief. Indeed, all available indicia of the legislative view on the matter reflect the contrary.

Prior to the enactment of the 1938 Resolution, and for seven years thereafter, per annum employees received no additional compensation for work performed on holidays. As we have seen, this fact was brought to the attention of Congress in the Committee Report on the 1938 Resolution. It is reasonable to suppose that, had the Congressional feeling at the time been that it is inherently unjust to pay a per diem Government employee the same holiday pay irrespective of whether he is required to work or not, prompt corrective action would have been taken with regard to per annum employees in a similar situation. It of course can hardly be suggested that holiday work is any more attractive to an employee because his compensation is fixed on an annual, rather than on a monthly or daily, basis.

That in 1938 Congress did not subscribe to the view of the court below in this regard is further evidenced by several special statutes preceding the 1938 Resolution. These statutes authorized the grant of holiday gratuity pay to per diem employees for certain specified days—not encompassed by the 1885 Resolution, as amended—on which Government establishments generally were closed. Each in terms was limited in application to per diem employees who had been excused from work on the day in question; none of them authorized double pay for employees who had been required to work. The House Joint Resolution of March 29, 1937, 50 Stat. 56, which was enacted by the same Congress as enacted the 1938 Resolution, is typical:

> [T]he employees of the United States Government in the District of Columbia and the employees of the District of Columbia who come within the provisions of the Act approved June 18, 1888, and who under the provisions of said Act *did not work* on Wednesday, January 20, 1937, due to the closing of their places of employment on account of the holiday, shall be entitled to pay for said holiday [emphasis added].[14]

See also Joint Resolution of March 3, 1923, 42 Stat. 1444; Joint Resolution of June 27, 1930, 46 Stat. 826.

C. *Contemporaneous construction of the 1938 Resolution by the Comptroller General and by the House Committee on Revision of the Laws.*

The repeal of the 1885 Resolution, to the extent that it ever established a statutory right to double pay for

[14] The Act of June 18, 1888, 25 Stat. 185, made Inauguration Day a legal holiday within the District of Columbia.

holiday work, is also evidenced by the contemporaneous construction of the 1938 Resolution by the Comptroller General and the Committee on Revision of the Laws of the House of Representatives.

1. *The Comptroller General's interpretation*

The Comptroller General has consistently ruled that under the 1938 Resolution gratuity pay is not mandatory for those holidays on which an employee actually works. Shortly after its enactment, on July 6, 1938, he advised the Secretary of the Navy that the Resolution repealed the requirement that per diem employees be paid gratuity pay for holiday work and that "such employees are now entitled to pay for holidays only under and subject to the conditions of the [Resolution]." 18 Comp. Gen. 10, 13. Identical interpretations of the Resolution were given to the Secretary of War on August 19, 1938 (18 Comp. Gen. 186), the Public Printer on August 23, 1938 (18 Comp. Gen. 191), and to the Governor of the Panama Canal on August 29, 1938 (18 Comp. Gen. 206).[15]

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[15] In his response to the Secretary of War on August 19, 1938, the Comptroller General elaborated upon the interpretation of the 1938 Resolution contained in his communication to the Secretary of the Navy [18 Comp. Gen. at 188]:

"Hence regular per diem, per hour, and piece-work employees are entitled to their regular pay for holidays on which no work is performed only if and when they 'are relieved or prevented from working solely because of the occurrence of' the holiday. If they are relieved or prevented from working on the holiday for any reason other than the occurrence of the holiday, such as when the holiday occurs on a non-work day, or within a period of furlough or leave of absence, no pay for the holiday as such is authorized. If such employees are required to work on a holiday occurring within their regular tour of duty, only 1 day's pay is authorized —payment of gratuity holiday pay in addition being no longer authorized. If the holiday occurs on a day outside the regular tour of duty of 40 hours per week and work is required on the holi-

Upon receipt of the Comptroller General's decision, the Secretary of the Navy, by circular letter of August 17, 1938, amended the then existing Schedule of Wages. The Secretary directed the deletion of those provisions of the Schedule which stipulated that gratuity pay was to be allowed (1) for work on legal holidays and (2) for legal holidays not within the employee's regular tour of duty and upon which no work was performed (R. 22). The substitution of the following was directed (R. 24):

> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, within the employee's regular tour of duty, *the schedule rate of pay shall be allowed.*
>
> Whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday by Federal statute or Executive Order, or any day on which the departments and establishments of the Government are closed by Executive Order, he shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, not exceeding eight hours, when not a part of the employee's regular tour of duty, performed under

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day, the employee is not entitled to 2 days' pay, one for working and one for the holiday, but may be entitled to overtime pay for the day under administrative regulations at a rate not less than one and one-half times their regular pay. * * *"

proper authority, the schedule rate of pay plus 50% additional shall be allowed [emphasis added].

* * * * *

This amendment was reflected in subsequent Schedules of Wages, including that which governed respondent's employment during the time here involved,[15a] and in Sections 250.7-12 and 250.7-13 of the Navy Civilian Personnel Instructions, issued April 13, 1945 (R. 24).

This contemporaneous interpretation of the 1938 Resolution by the legislative agency [16] charged with the supervision of the payment of salaries to all governmental employees [17]—an interpretation, moreover, immediately put into effect by the Executive Departments—is entitled to great weight and is not to be overturned unless clearly erroneous. *Inland Waterways Corp.* v. *Young,* 309 U.S. 517; *United States* v. *Jackson,* 280 U.S. 183, 193; *United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214; *United States* v. *Madigan,* 300 U.S. 500, 506; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 549; *Adams* v. *United States,* 319 U.S. 312, 314-315; *Edward's Lessee* v. *Darby,* 12 Wheat. 207, 210.

In this connection, we respectfully note that the observation made by this Court in the *Kelly* case (342

[15a] Schedule of Wages, revised to October 16, 1944, provided in part (paragraph 5(g), p. 21):

"For work on any day declared a holiday by Federal statute or Executive Order, or on any closed day, when within the employee's regular tour of duty, the same rate of pay is allowed as for any other day within the regular tour of duty."

[16] The General Accounting Office is an agency in the legislative branch of the Government. United States Government Organization Manual 1951-52, p. 34.

[17] Act of July 31, 1894, Sec. 7, 28 Stat. 206, as amended, 31 U.S.C. (1946 ed.) 72.

U.S. at 196 (footnote 6) and repeated in the decision below (R. 16)—suggesting that the interpretation leads to the absurd result of paying an employee less for working than for not working—does not actually accord with the construction employed in practice. Under the Comptroller General's view, an employee who works for part of a holiday—a day for which gratuity pay would be allowed if he did not work at all—receives a full day's pay, consisting of pay for the number of hours worked plus gratuity pay for the balance of the holiday. See 24 Comp. Gen. 843; S. Rept. 1470, 83d Cong., 2d Sess.[18] Thus, per diem employees such as respondent occupied no different position from that of per annum employees, whose pay for holidays (prior to the passage of the Federal Employees' Pay Act of 1945, *infra*, pp. 36-37) was not affected by whether they worked the entire holiday, worked only a part of it, or were excused from working entirely.

2. *The legislative interpretation*

The 1940, 1946, and 1952 editions of the United States Code, prepared under the supervision of Committees of the House of Representatives,[19] have similarly treated the 1938 Resolution as repealing the 1885 Res-

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[18] S. Rept. 1470 was submitted in connection with the Act of June 14, 1954, 68 Stat. 249, which amended the Joint Resolution of 1938 to include within its scope days upon which per diem employees "are relieved or prevented from working by administrative order issued under such regulations as may be promulgated by the President." See n. 1, *supra*, p. 2.

[19] The 1940 and 1946 editions were prepared under the supervision of the Committee on the Revision of the Laws. Act of May 29, 1928, § 2, 45 Stat. 1007, as amended, 1 U.S.C. (1940 ed.) 52 (d). In 1947, this function was transferred to the Committee on the Judiciary. Act of July 30, 1947, § 1, 61 Stat. 633, 1 U.S.C. 202.

olution to the extent that the latter required payment of gratuity pay to those per diem employees who worked on holidays. In the 1934 edition of the Code, the 1885 Resolution was codified in 5 U.S.C. 86. In the 1940 and 1946 editions, 5 U.S.C. 86 is followed by a notation reading in pertinent part:

> As originally enacted this section also contained a provision relating to pay of employees for work on holidays. Said provision was repealed by act June 29, 1938, ch. 818, § 2, 52 Stat. 1247 * * *.

Accordingly, in those editions the Section omits the words "and shall receive the same pay as on other days" which originally appeared in the 1885 Resolution. And, in the 1952 edition, the text of the 1885 Resolution does not appear at all:

> § 86. Repealed. June 29, 1938, ch. 818, § 2, 52 Stat. 1247.
>
> Section, acts Jan. 6, 1885, No. 5, 23 Stat. 516; Feb. 23, 1887, No. 6, 24 Stat. 644; June 29, 1938, ch. 818, § 2, 52 Stat. 1247, related to holidays for per diem employees, and is now covered by section 86a of this title.[20]

While the United States Code is only *prima facie* evidence of the law (1 U.S.C. (1946 ed., Supp. IV) 204(a)), the construction placed by a Committee of the House of Representatives on a recent enactment is not lightly to be disregarded. This is especially true where, as here, the construction is a reasonable one and there is no inconsistency between the Statutes at Large and the Code. Cf. *Stephan* v. *United States,* 319 U. S.

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[20] 5 U.S.C. 86a is the 1938 Resolution. The act of February 23, 1887, also referred to in the note in the 1952 edition of the Code, amended the 1885 Resolution to add Memorial Day to the list of holidays covered by the Resolution.

423, 426; *Hoague-Sprague Corp.* v. *Frank C. Meyer Co.*, 31 F. 2d 583, 586 (E.D. N.Y.); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, 801-802 (S.D. Cal.).

The short of the matter is that, viewed from the standpoint of its terms, its purpose, and its consistent administrative and legislative interpretation, the 1938 Resolution (1) does not require the award of gratuity pay for work performed on holidays and (2) repeals the 1885 Resolution to the extent, if any, that the latter required such pay. The court below thus erred in granting respondent recovery of double pay as a matter of statutory right.

III

The Policy of Non-Observance of Wartime Holidays Supports Denial of Gratuity Pay to Per Diem Employees for Work on Those Holidays.

In normal times there is ample justification for paying an employee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from his normal way of living. These considerations justify payment of premium pay to those federal employees who are required to work when other federal employees are excused from work and allowed to enjoy an uninterrupted holiday without loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the

maximum output needed for waging a successful war. The 1943 Presidential directives, declaring the overriding wartime need, required all civilian Government employees to work on all holidays throughout the war with the exception of Christmas (*supra,* pp. 4-5). The normal peacetime holidays were thus converted into regular work days and employees generally were required to work on those days "without additional compensation" (*supra,* p. 5).

The policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when holidays are regular work days) is reflected in the Federal Employees Pay Act of 1945. That Act, which became law after VE Day but before VJ Day, provided that its provision for premium pay for holiday work was not to take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U.S.C. 922. Postponement of the effective date of the premium-pay provision was necessary because of the express Congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. No. 726, 79th Cong., 1st Sess., p. 13.[21] Since the holidays involved in the instant litigation were regular wartime work days (*supra,* pp. 4-5), it is apparent that the decision below allowing gratuity pay for holiday work conflicts with well-established policy allowing such pay only for peacetime holidays.[22] Pursuant to that policy, per annum employees worked on holidays throughout

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[21] This report accompanied H. R. 3393, which became the Federal Employees' Pay Act of 1945.

[22] Section 302 of the Federal Pay Act of 1945 does not apply to ungraded employees such as Bergh (*i.e.*, employees whose rate of pay is fixed by administrative action rather than by statute). To correct the resulting inequity, the Secretary of the Navy and the

World War II without receiving any additional compensation. Cf. *Di Benedetto* v. *United States,* 108 C. Cls. 18, certiorari denied, 332 U. S. 763. Nothing in the terms or history of federal pay legislation justifies the discrimination sanctioned by the court below in favor of per diem employees. And, in any event, the policy itself is a pertinent consideration in resolving the statutory question presented here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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AUGUST, 1956.

Secretary of War jointly requested a ruling from the Comptroller General as to whether they administratively could authorize premium pay for holiday work performed by ungraded employees. On February 7, 1946, the Comptroller General responded in the affirmative (25 Comp. Gen. 584), relying in large measure upon the "present legislative policy" with regard to peacetime holiday pay reflected by the 1945 Act. Twelve days later, the Secretary of the Navy issued an order directing that all ungraded employees required to work on a holiday within their normal tour of duty be paid for such work at the rate of 1½ times their scheduled rate of pay. And when, by Section 11 of the Act of May 24, 1946, 60 Stat. 218, Congress amended the 1945 Act to increase the pay for holidays worked by graded employees to two times their regular pay, the Department of the Navy adjusted the holiday pay of its ungraded employees accordingly. See, *e.g.*, Navy Civilian Personnel Instruction 85.6-3, issued February 17, 1955.

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